

MAR 27 2008

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
WILTON B. CARSON, III,)	
SHARON W. CARSON,)	CASE NO. 06-68324-MHM
)	
Debtors.)	
)	
<hr/>		
ERIC J. WILLIAMS,)	
)	
Plaintiff,)	
v.)	ADVERSARY PROCEEDING
)	NO. 07-9050
WILTON B. CARSON, III,)	
)	
Defendant.)	

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the court on Defendant's motion for summary judgment. Plaintiff opposes the motion for summary judgment.

Plaintiff's complaint seeks a determination that Plaintiff's claim against Defendant is non-dischargeable pursuant to 11 U.S.C. §523(a)(2). The facts set forth in the complaint are sparse and conclusory. Plaintiff states in the complaint that he has a claim against Defendant based upon a default judgment issued by Cobb County State Court in the amount of \$37,593. In support of the allegation that the claim is nondischargeable, Plaintiff states that Plaintiff and Defendant engaged in an undefined transaction, that Defendant made material

misrepresentations that Defendant knew were false, that Defendant intended Plaintiff to rely on those representations, that Plaintiff did reasonably rely on those representations, and that as a result, Plaintiff entered into a contract with Defendant and was directly and proximately injured by the representations.

In support of the motion for summary judgment, Defendant shows the following undisputed facts: On October 28, 2003, Defendant and Plaintiff executed an agreement whereby Defendant and Plaintiff would split the net proceeds from the sale of certain undeveloped lots located on Hadaway Road in Cobb County (the "Hadaway lots"). Also on October 28, 2003, Plaintiff wrote a check to Defendant for \$30,000 and Defendant executed a promissory note to Plaintiff in the amount of \$30,000, with a maturity date of April 30, 2004. Defendant failed to acquire the Hadaway lots and failed to repay the \$30,000 to Plaintiff. Plaintiff sued Defendant in Cobb County State Court on the note and obtained a default judgment in the amount of \$37,593. The state court complaint against Defendant contained no allegations of fraud.

Defendant also alleged that he made no misrepresentations to Plaintiff, and that he intended to acquire the Hadaway lots but was unable to do so. Plaintiff disputes that Defendant made no misrepresentations. Although neither Plaintiff's complaint nor the memorandum of law filed in response to Defendant's motion for summary judgment contain any specific allegations describing any false

representation by Defendant, the affidavit of Plaintiff¹ that accompanied Plaintiff's response to Defendant's motion states that, after Plaintiff obtained the default judgment against Defendant, Plaintiff spoke to Devon Petty, the owner of the Hadaway lots. Plaintiff reports that Mr. Petty told Plaintiff that he had never talked to Defendant about selling the Hadaway lots and had never offered the Hadaway lots for sale.²

Defendant asserts that he is entitled to summary judgment on the grounds that (1) Plaintiff failed to plead fraud with specific particularity; (2) Plaintiff failed to come forward with specific evidence of every element of fraud; and (3) Plaintiff is barred by the doctrine of collateral estoppel from asserting fraud in this proceeding.

Bankruptcy Rule 7009 incorporates Fed. R. Civ. Proc. 9(b), which provides that, in a complaint averring fraud, "the circumstances constituting fraud...shall be stated with particularity." As a general rule, however, a liberal approach to fraud pleading in bankruptcy cases, especially in the context of §523(a)(2), is appropriate. *Davidson v. Bank of New England (In re Hollis and Company)*, 86 B.R. 152 (Bankr. E.D. Ark. 1988). *See also, Johannessen*, 76 F. 3d 347 (11th Cir. 1996). "All the

¹ Plaintiff's response was also accompanied by several unidentified pages of what appears to be a portion of a transcript and is labeled with a handwritten "Exhibit E." Those pages were not considered in connection with the conclusions in this order.

² Plaintiff's recitation of what he was told by Mr. Petty would probably be inadmissible hearsay if offered for the truth of the matter asserted, but Defendant did not object to Plaintiff's affidavit or the apparent hearsay contained therein. Therefore, pursuant to Federal Rule of Evidence 103, it is admissible, and will be considered to be a proffer in support of Plaintiff's otherwise unsupported allegations that Defendant misrepresented facts in connection with the transaction with Plaintiff.

Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, at 47 (1957). Therefore, this contention of Defendant is without merit.

Defendant's second contention in support of summary judgment – that Plaintiff has failed to come forward with specific evidence of every element of fraud – has been negated by Plaintiff's response to Defendant's motion for summary judgment. Plaintiff has offered a specific description of the misrepresentations by Defendant. As pieced together from the affidavit of Plaintiff, together with the facts undisputed by Defendant, Defendant misrepresented to Plaintiff that Defendant intended to acquire the Hadaway lots from Devon Petty at below-market value and that, in return for Plaintiff's loan of \$30,000, Defendant would split with Plaintiff the proceeds from the resale of the Hadaway lots. Defendant knew his representations were false because he had never spoken with Mr. Petty. Plaintiff relied on Defendant's misrepresentations and made the loan to Defendant. The loan has not been repaid. Therefore, Plaintiff has proffered sufficient evidence to support his claim for relief on this point to survive Defendant's second contention.³

Finally, Defendant asserts that Plaintiff is precluded from asserting a claim

³ In his response to Defendant's motion for summary judgment, Plaintiff alludes to a claim under §727 objecting to Defendant's discharge. Plaintiff's complaint contains no such objection to discharge. Defendant's motion for summary judgment raised no issues relating to an objection to discharge. Therefore, Plaintiff's allusions to facts relating to an objection to discharge have not been considered.

under §523(a)(2), *i.e.*, that Plaintiff's claim is nondischargeable because it arose as a result of Defendant's fraudulent misrepresentations, because Plaintiff failed to plead fraud in the state court complaint that resulted in the default judgment against Defendant. A judgment obtained by default, however, is unavailable to preclude litigation of any issues because no issues were "actually litigated." *Blakely v. Couch*, 129 Ga. App. 625 (1973). Therefore, this contention is without merit. Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is denied.

The Clerk is directed to serve a copy of this order upon Plaintiff's attorney, Debtors, and Defendant's attorney.

IT IS SO ORDERED, this the 26th day of March, 2008.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE